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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**  
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8 LANCE REBERGER,

9 *Plaintiff,*

10 vs.

11 ALL ESP CULINARY PERSONNEL, *et al.*,

12 *Defendants.*  
13

3:13-cv-00590-RCJ-VPC

ORDER

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15 This prison civil rights action comes before the Court on, *inter alia*, plaintiff's motions  
16 (## 12 and 13) for a temporary restraining order and a preliminary injunction.

17 ***Background***

18 Plaintiff alleged in the second amended complaint that his meals did not comply with  
19 the requirements of a continuing directive by Dr. Michael Koehn, M.D., that he be placed on  
20 a double portion cholesterol/fat restricted diet. According to the pleading, Dr. Koehn placed  
21 plaintiff on this diet so that he would be able to take his HIV medication with food. Plaintiff  
22 alleged that he was provided eggs, whole milk, and lunch meat in violation of the medically  
23 required diet. He alleged that he is allergic to egg yolks. With regard to whole milk, he  
24 alleged that he instead was supposed to be provided "smart milk," a "non-dairy milk replacer."<sup>1</sup>  
25 He further alleged that he was being provided mustard in violation of the diet.<sup>2</sup>

26 *///*  
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28 <sup>1</sup>#10, at 4B (electronic docketing page 8).

<sup>2</sup>*Id.*, at 4D (electronic docketing page 10).

1 Plaintiff alleged that if he was provided these foods allegedly in violation of Dr. Koehn's  
2 medical orders he faced serious and immediate health risks. He alleged that the health risks  
3 include, *inter alia*, death from heart attack or stroke and/or infection due to an allegedly  
4 compromised immune system. (The allegations appear to reflect that plaintiff is HIV  
5 seropositive rather than currently suffering from acute or advanced AIDS with a fully  
6 compromised immune system unresponsive to medication.) He maintains that "culinary  
7 knows if he were to consume all eggs and whole milk at the same time he would be dead or  
8 at the very least paralyzed for life."<sup>3</sup>

9 Plaintiff further alleged that, following being "poisoned with some kind of chemical,  
10 cleaner, rat poison, etc., he cannot eat any meals such as spaghetti, beef stew, sloppy joes,  
11 Mexican, mashed potatoes, chili mac, chili, soups, hot cereals, or mashed fruits, and others."<sup>4</sup>

12 In the motions for a temporary restraining order and preliminary injunctive relief, as  
13 thereafter modified by plaintiff's second supplemental reply, plaintiff seeks an order prohibiting  
14 "culinary personnel from serving Plaintiff any real eggs, any lunch meat, [and] whole milk –  
15 despite whole milk being corrected."<sup>5</sup>

16 Defendants have submitted a declaration under penalty of perjury by the  
17 aforementioned Dr. Michael Koehn, M.D., with their response to the motions.

18 Dr. Koehn attests, *inter alia*, that: (a) plaintiff currently has a medical order to receive  
19 the low cholesterol/low fat diet and is authorized to receive a double portion diet; (b) after  
20 plaintiff made complaints that he was allergic to eggs, Dr. Koehn tested plaintiff for allergies  
21 to egg products; (c) the results of the allergy testing indicated that plaintiff "did not exhibit an  
22 allergy to any egg part, yoke, white or the whole egg;" (d) plaintiff made numerous complaints  
23 relating to his contention that he cannot consume eggs and requested that Dr. Koehn order  
24 that he not receive eggs but "[t]here is no medical basis to alter the diet currently order[ed]"

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26 <sup>3</sup>#10, at 4C (electronic docketing page 8).

27 <sup>4</sup>*Id.*, at 4A (electronic docketing page 7).

28 <sup>5</sup>#12, at 4, as modified by #26 (with underline emphasis as in the modifying filing).

1 that Inmate Reberger receive;" and (e) "[t]he medical diet currently ordered to be served to  
 2 Inmate Reberger does not place him in imminent danger of a heart attack, stroke, or any other  
 3 health risk factor that is outside of his current medical conditions."<sup>6</sup>

4 Defendants further have presented a copy of the menu list for prison special diets,  
 5 including the low fat/cholesterol diet. The menu for that particular special diet includes, *inter*  
 6 *alia*, eggs, luncheon meat sandwiches, mustard, and nonfat milk.<sup>7</sup>

7 Nothing in either Dr. Koehn's declaration or the special diet menu reflects that an  
 8 inmate on the diet must be provided "smart milk" as a "non-dairy milk replacer." The menu  
 9 does include "milk replacer" as well as the "non fat milk," but nothing on the menu reflects that  
 10 an inmate must be given one in lieu of the other for all inmates on the diet.

### 11 ***Discussion***

12 As stated by the Supreme Court with respect to preliminary injunctive relief:

13 A plaintiff seeking a preliminary injunction must establish  
 14 that he is likely to succeed on the merits, that he is likely to suffer  
 15 irreparable harm in the absence of preliminary relief, that the  
 balance of equities tips in his favor, and that an injunction is in the  
 public interest. . . .

16 . . . . .

17 A preliminary injunction is an extraordinary remedy never  
 18 awarded as of right. . . . In each case, courts "must balance the  
 19 competing claims of injury and must consider the effect on each  
 20 party of the granting or withholding of the requested relief." . . .  
 "In exercising their sound discretion, courts of equity should pay  
 particular regard for the public consequences in employing the  
 extraordinary remedy of injunction." . . . .

21 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 & 24 (2008).

22 In the present case, plaintiff's allegations that he is being provided eggs and lunch  
 23 meat in violation of Dr. Koehn's medical orders – and at serious peril to his health – are not  
 24 supported by what the physician states his medical orders actually require and by what the  
 25 special diet in question requires.

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 27 <sup>6</sup>#18-4, Ex. C.

28 <sup>7</sup>See #18-2, Ex. A-1.

1 Plaintiff urges in his reply that Dr. Koehn always testifies for the defendants for benefit  
 2 and that his affidavit has many holes and is inaccurate. However, the expressly stated  
 3 gravamen of plaintiff's complaint is that he is being given food – including eggs and lunch  
 4 meat – that violates Dr. Koehn's medical orders. If Dr. Koehn denies plaintiff's assertion that  
 5 his medical orders require that plaintiff not be provided eggs, then plaintiff, at best, cannot  
 6 establish a substantial likelihood of success in that regard and, at worst, perhaps might start  
 7 considering his potential exposure to sanctions, including disciplinary sanctions, for making  
 8 a false statement to a court.<sup>8</sup>

9 Substantially the same conclusion follows with regard to lunch meat. The required  
 10 special diet in question clearly includes lunch meat. Plaintiff's self-serving characterization  
 11 of the lunch meat as "greasy fatty" does not tend to establish a substantial likelihood of  
 12 success. Nor does such a self-serving pejorative characterization establish a substantial risk  
 13 that plaintiff will be "dead or at the very least paralyzed for life" in the absence of interlocutory  
 14 injunctive relief while continuing to be served the lunch meat.<sup>9</sup>

15 With regard to whole milk, plaintiff acknowledges In his supplemental reply<sup>10</sup> that prison  
 16 culinary stopped serving him whole milk on June 27, 2014, after being directed to do so by

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 18 <sup>8</sup>Plaintiff suggests that the Court's screening order establishes a substantial likelihood of success on  
 19 the merits. The screening order instead establishes only that plaintiff's allegations state a claim for relief  
 20 under liberal pleading rules under which, *inter alia*, the truth of his factual allegations is assumed for purposes  
 21 of screening review.

22 Plaintiff refers also to being served raw eggs despite a compromised immune system. However, he  
 23 alleged in the complaint, *inter alia*, that he is allergic to any eggs and that he is being served "three types of  
 24 real eggs almost daily - fried, scrambled, [and] hard boiled eggs." #10, at 4 (electronic docketing page 6).  
 25 Plaintiff seeks injunctive relief barring prison culinary from serving him "any real eggs," which relief the  
 26 medical orders that he invoked do not support. To the extent – if any – that plaintiff has been served a raw  
 27 egg while also being served "three types of real eggs almost daily - fried, scrambled, hard boiled eggs," he  
 28 can protect himself from alleged potential harm from such an episodic event (*i.e.*, the opposite of "almost  
 daily") without injunctive relief. Meanwhile, plaintiff has not established a basis for the interlocutory injunctive  
 relief that he seeks – prohibiting culinary personnel from "serving Plaintiff any real eggs."

<sup>9</sup>Such hyperbole does not establish that irreparable injury is likely in the absence of an injunction. A  
 plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction," not merely that  
 there is some possibility of irreparable injury. *Winter*, 555 U.S. at 22 (emphasis in original).

<sup>10</sup>#25, at 3. Plaintiff may not submit multiple replies in support of a motion, regardless of the overall  
 time period for filing a reply. Once he files a reply, he may not file supplemental replies without leave.

1 a letter. Plaintiff's request for injunctive relief with regard to being served whole milk therefore  
2 is moot.

3 Plaintiff accordingly has failed to present a viable basis for interlocutory injunctive relief  
4 or for further proceedings in regard to same. Plaintiff's request for injunctive relief barring  
5 culinary from serving him "any real eggs" and "any lunch meat" is not supported by the  
6 medical orders by the physician to whom plaintiff expressly referred in his complaint.  
7 Plaintiff's request for injunctive relief as to whole milk is moot, with plaintiff expressly  
8 acknowledging that the issue has been corrected. Federal courts otherwise do not oversee  
9 prison menu selections.<sup>11</sup>

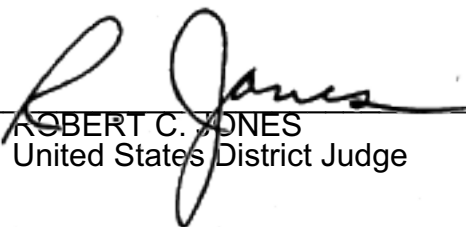
10 IT THEREFORE IS ORDERED that plaintiff's motions (## 12 and 13) for a temporary  
11 restraining order and a preliminary injunction are DENIED.

12 IT FURTHER IS ORDERED that defendants' motion (#19) to file exhibits under seal  
13 is GRANTED.

14 IT FURTHER IS ORDERED that no further motions will be entertained during the  
15 currently pending stay for mediation. The Court excepted the current motions from the stay  
16 to address whether interlocutory injunctive relief was warranted. It is not. The stay now  
17 applies in all respects. See #14, at 4.

18 Nothing herein precludes the initiation of prison disciplinary proceedings under MJ48  
19 for making false statements to a court.

20 DATED: July 29, 2014.

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24 ROBERT C. JONES  
United States District Judge

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25 <sup>11</sup>Plaintiff dropped his request for injunctive relief as to cheese in his second supplemental reply.  
26 It appears to be undisputed that cheese is not included in the special diet. It further appears, however, that  
27 plaintiff's suggestion that he will be "dead or at the very least paralyzed for life" if he *arguendo* is provided  
28 cheese in error prior to a judgment herein are based upon hyperbole and generalized health risks, even for  
an individual with high cholesterol. Moreover, plaintiff is not subjected to irreparable injury by, for example,  
*arguendo* having to remove a piece of cheese from a sandwich.